Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JASON RIVERA,

Petitioner,

v.

ANTHONY LA MARQUE, Warden, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the one year statute of limitations of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1), can be equitably tolled because of attorney abandonment, where a habeas petitioner's attorney fails to prepare and file a federal habeas petition within the one year period and abandons the case after nine months of the limitation period has run?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Jason Rivera, Anthony La Marque and the Attorney General of the State of California.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Jason Rivera petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals dated November 30, 2001 is an unreported memorandum decision and is attached as Appendix A. The order of the Court of Appeals denying a petition for rehearing and request for rehearing en banc dated January 8, 2002 in unreported and is attached as Appendix D. The report and Recommendation of the United States Magistrate Judge dated January 30, 2000 is attached as Appendix C. The Judgment of the District Court dated July 31, 2000 is attached as Appendix B.

JURISDICTION

The jurisdiction of the court is invoked under 28 U.S.C. § 1254 and Rule 13 of the Rules of the Supreme Court.

STATUTORY PROVISION

Title 28, United States Code section 2244(d)(1) provides in pertinent part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

STATEMENT OF THE FACTS

Petitioner, Jason Rivera, was convicted in the California State Courts of the crimes of second degree murder and attempted murder in the first degree. He was sentenced to 15 years to life for murder and a consecutive life sentence for attempted murder. Mr. Rivera appealed his case to the California Court of Appeal where the conviction was affirmed. He appealed to the California Supreme Court and his petition for review was denied.

Rivera and his father hired attorney Nedra Ruiz to file a federal petition for writ of habeas corpus. Ms. Ruiz had been Mr. Rivera's appellate counsel in the state appeals. Mr. Rivera's final state appeal was denied on June 18, 1997 and it was in that month that Nedra Ruiz agreed to represent Rivera in his federal habeas corpus proceedings.

Nedra Ruiz had originally promised to file Rivera's petition in November of 1997, but she failed to meet that date. She later promised to file a petition in January of 1998, but failed to file on that date. She again promised petitioner and his father to file the federal petition in February of 1998 but failed on that occasion. In February of 1998, Ms. Ruiz stated that it would be necessary to exhaust Mr. Rivera's federal claims in state court before proceeding to federal court. She promised to file state

habeas corpus petitions in order to exhaust his federal claims in state court. However, she failed to file any petition in either state or federal court. Finally, in June of 1998, one year after she had agreed to represent Rivera in the federal habeas proceeding, she withdrew from Rivera's case and advised him to hire a new attorney. Nedra Ruiz simply abandoned Mr. Rivera's case after performing almost no work on the case for an entire one year period.

Rivera's father employed a new attorney in July of 1998. The new attorney, Joseph F. Walsh, was unfamiliar with Rivera's case. He needed to review the 17 volume record of Rivera's one month long jury trial, the legal briefs previously filed in the case, and the state court opinions. He needed to review the police reports, listen to tape recorded witness statements, investigate the case for newly discovered evidence and investigate the issue of ineffective assistance of counsel.

While working on the case, the one year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1), expired on September 16, 1998. Rivera's new attorney filed Rivera's first state exhaustion petition on December 1, 1998. This was 76 days after the statute of limitations had expired.

When Rivera filed his federal petition for writ of habeas corpus, after exhausting his state remedies, the Attorney General moved to dismiss on the grounds that the petition was barred by the one year statute of limitations of the AEDPA. Rivera then made a motion for equitable tolling of the statute of limitations on the

grounds of attorney abandonment based on Nedra Ruiz's failure to work on his case for 12 months causing nine months of the limitation period to expire, and Ruiz's subsequent abandonment of Rivera's case.

The district court denied Rivera's request for equitable tolling and dismissed the petition. Rivera was granted a certificate of appealability on the following issue: "Whether the one year statute of limitations should be equitably tolled because Rivera's counsel failed to file a federal habeas petition within the one year period and counsel abandoned Rivera's case after nine months of the limitations period had run?" A three judge panel affirmed the decision of the district court finding that "Rivera's attorneys' failure to file a petition constitutes ordinary attorney negligence and did not constitute grounds for equitable tolling." The Ninth Circuit relied upon this court's decision in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) (holding in Title VII context that attorney's ordinary negligence does not warrant equitable tolling).

REASON FOR GRANTING THE WRIT

I

ATTORNEY ABANDONMENT IS GROUNDS FOR EQUITABLE TOLLING OF THE AEDPA ONE YEAR STATUTE OF LIMITATIONS.

This petition raises the issue of whether attorney abandonment is grounds for equitably tolling the one year statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C.

§ 2244(d)(1). In *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990) this court accepted the doctrine of equitable tolling of the statute of limitations in a Title VII civil rights case. However, the court found that equitable tolling did not apply to cases of ordinary negligence of an attorney. Id. at 96.

The AEDPA involves the litigation of federal habeas corpus petitions filed by prisoners in state prisons who seek review in federal court of claimed violations of their federal constitutional rights in the state court proceedings resulting in their incarceration. *Lindh v. Murphy*, 521 U.S. 320 (1997). The AEDPA imposes a one year statute of limitations on the filing of a federal habeas corpus petition by a state prisoner. 28 U.S.C. § 2244(d)(1).

At issue in petitioner's case is whether equitable tolling of the statute of limitations is available to a state prisoner who files a federal petition for writ of habeas corpus. Also at issue is whether attorney abandonment is grounds for equitable tolling under the AEDPA.

Issues related to the tolling of the one year statute of limitations of the AEDPA have recently been before this court in *Duncan v. Walker*, 533 U.S. 167 (2001). In *Duncan*, the court held that a federal habeas petition is not an application for State post conviction or other collateral review within the meaning of 28 U.S.C. § 2244(d)(2), and thus a first federal habeas petition does not toll the limitations period for a subsequent petition. One year earlier, the court had decided *Artuz v. Bennett*, 121 S. Ct. 361 (2001). In *Artuz* the court held that the tolling provision of the AEDPA, 28 U.S.C. § 2244(d)(2) applies to a "properly filed" application for State post conviction or other

collateral review regardless of whether state law bars the claim on procedural grounds.

This court now has before it the case of *Newland v. Saffold*, No. 01-301, 122 S. Ct. 22 (2001) which raises another issue relating to the tolling of the statute of limitations. In *Newland* the issue is whether the four month period between the State Court of Appeal's denial of a habeas petition and the filing of an original habeas petition in the California Supreme Court falls within the meaning of "pending" in 28 U.S.C. § 2244(d)(2), which tolls running of the limitations period while a properly filed application for State post conviction relief is pending. Petitioner's case raises an issue of similar concern, but focuses on the question of "equitable tolling" of the AEDPA's one year statute of limitations, a question not yet addressed by any Supreme Court decision.

Equitable tolling of the AEDPA's one year statute of limitation is permitted "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Pruntey*, 187 F.3d 1104, 1107 (9th Cir. 1999); *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998); *Calderon v. United States District Court (Beeler)* 128 F.3d 1283, 1288-89 (9th Cir. 1997); see also *Whalem-Hunt v. Early*, 223 F.3d 1146, 1148 (9th Cir. 2000); *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1997). Several federal cases have already held that attorney abandonment does constitute grounds for equitable tolling of the statute of limitations in civil rights actions against the government. *Seitzinger v. Reading Hosp. and Medical Center*, 165 F.3d 236, 240-241 (3rd Cir. 1999); *Cantrell v. Knoxville Community Dev. Corp.*,

60 F.3d 1177, 1180 (6th Cir. 1995); *Burton v. United States Postal Serv.*, 612 F. Supp. 1057, 1059 (N.D. Ohio 1985).

In *Cantrell v. Knoxville Community Dev. Corp.*, 60 F.3d 1177, 1179-80 (6th Cir. 1995), the trial court granted the plaintiff's motion for equitable tolling of the 180 day filing period required for the filing of an EEOC lawsuit. The District court granted equitable tolling on the grounds that the plaintiff's attorney had abandoned plaintiff's case due to his mental illness. The Court of Appeal stated that "[T]his is not a case of garden variety attorney negligence. If Cantrell pursued his claim diligently, yet was abandoned by his attorney due to his attorney's mental illness, equitable tolling may be appropriate." *Cantrell*, 60 F.3d at 1170-80.

In *Seitzinger v. Reading Hosp. and Medical Center*, 165 F.3d 236 (3rd Cir. 1999), the court also found that attorney abandonment constitutes grounds for equitable tolling. In *Seitzinger*, the plaintiff's attorney had not filed a lawsuit within the 90 day period after receipt of the EEOC's right to sue letter and the District Court granted summary judgment in favor of the hospital. On appeal, the plaintiff argued that the trial court should have extended the deadline under the doctrine of equitable tolling because of the misconduct of the plaintiff's lawyer. The Court of Appeal agreed stating: "We think there is a sufficient claim of attorney abandonment to bring the case within the narrow line of cases in which lawyer misconduct justifies equitable tolling." 165 F.3d at 237-38.

The Ninth Circuit decision in petitioner's case is in conflict with the Third and Sixth Circuit decisions in *Seitzinger* and *Cantrell*. The Ninth Circuit in petitioner's

case viewed attorney abandonment in federal habeas corpus cases as ordinary negligence that does not constitute grounds for equitable tolling. However, the Ninth Circuit's decision is based upon an incorrect application of *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990). In *Irwin*, this court was not faced with an issue of attorney abandonment.

In *Irwin*, this Court, in the context of a Title VII civil rights claim, stated that: "[T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect" by an attorney. *Irwin*, 498 U.S. at 96. In *Irwin*, the plaintiff's lawyer was out of the country when the right to sue letter was delivered to his office. Although the statute of limitations in that case was thirty days, the lawyer filed suit forty-four days later, although only twenty-nine days after his client received his copy of the letter. Since the lawyer's only excuse was his absence from the office, the court refused to apply equitable tolling. It is clear, however, that the *Irwin* case is not an attorney abandonment case. Petitioner's case does involve attorney abandonment.

Attorney abandonment of a client is attorney misconduct. It is not ordinary negligence. Attorney abandonment occurs when an attorney is hired to represent a client, but for an extended period of time he performs no legal work on the case and then abruptly withdraws from the case, causing the client's case to suffer prejudice because of the attorney's conduct.

Attorney abandonment is attorney misconduct that is subject to State Bar discipline. California Rules of Professional Conduct, Rule 3-110(A) provides that "A member

shall not intentionally . . . fail to perform legal services with competence." In the recent California Supreme Court case of *In re Sanders*, 21 Cal.4th 697, 712 (1999), the court held that abandonment by a defendant's prior appointed appellate and habeas corpus counsel did constitute good cause to excuse a substantial delay in the filing of a petition for writ of habeas corpus in a state capital case. The facts of the *Sanders* case are very similar to petitioner's case. The attorney appointed to represent Sanders on his direct appeal simply abandoned his duty to investigate and prepare a petition for habeas corpus in a timely manner. A later petition for writ of habeas corpus, filed after the state time limitation on state capital habeas petitions, was ordered filed because the defendant had been abandoned by his former counsel. Thus, the Ninth Circuit's decision in petitioner's case is in conflict with the reasoning of the California Supreme Court in *Sanders*.

Finally, the decision in petitioner's case appears to be in conflict with a Ninth Circuit capital case where equitable tolling was granted because one of two attorneys representing the prisoner left the case to take a job in another state. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997). The Ninth Circuit affirmed a district court's ruling that this constituted extraordinary circumstances which justified a seven month tolling of the AEDPA statute of limitations in order to permit the remaining counsel and a newly appointed second attorney to complete preparation of the petition for writ of habeas corpus in federal court. *Id.* at 1289.

In petitioner's case the facts are even more extreme. Petitioner's attorney lied to petitioner and his father for a full year, falsely stating she was working on the case and would be filing a petition in the near future. Finally after nine months of the one year statute of limitations had run, the attorney abandoned the case and her client, leaving behind no work product. It took one month for petitioner's father to hire a replacement attorney. Petitioner's case was a complex murder prosecution in the State court requiring new counsel to review the record of a one month trial, to investigate newly discovered evidence, to investigate ineffective assistance of counsel, and to research all possible federal claims available to the petitioner.

Replacement counsel had only two months left on the limitation period. It took four and a half months for replacement counsel to file a petition and accompanying legal brief. Under these facts, petitioner's motion for equitable tolling of two and a half months on the grounds of attorney abandonment should have been granted. This court should therefore grant certiorari and decide the important issue of whether attorney abandonment is grounds for the equitable tolling of the AEDPA's one year statute of limitations.

CONCLUSION

Based on the foregoing, petitioner urges the court to grant certiorari.

Respectfully submitted,

JOSEPH F. WALSH
Attorney for Petitioner
Jason Rivera

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON RIVERA, Petitioner-Appellant, v. ANTHONY LA MARQUE, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 00-56636 D.C. No. CV-99-00249-RT MEMORANDUM* (Filed Nov. 30, 2001)

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Argued and Submitted November 5, 2001
Pasadena, California

Before: GOODWIN, WALLACE, and THOMAS, Circuit Judges.

Jason Rivera, a California State prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 petition as time barred under 28 U.S.C. § 2244(d). We have jurisdiction pursuant to 28 U.S.C. § 2253. We review a district

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

court's dismissal of a habeas petition *de novo*. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).

Rivera contends that he was entitled to equitable tolling of the AEDPA's one-year statute of limitations because his first attorney abandoned his case after nine months of the limitations period had passed, leaving his replacement attorney with only two months in which to timely file Rivera's habeas petition.

Equitable tolling of the AEDPA's one-year statute of limitations is appropriate only where extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. *See Calderon v. United States Dist. Court for Cent. Dist. of Cal. (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court for Cent. Dist. of Cal. (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

We have recognized equitable tolling of the AEDPA's limitations period in situations where external forces, rather than a petitioner's lack of diligence, are the cause of the petition's untimeliness. *See Miles*, 187 F.3d at 1107 (equitably tolling AEDPA where prison authorities failed to follow prisoner's request to draw filing fee for habeas petition from his trust account and mail his check and petition to district court for filing); *Calderon (Kelly)*, 163 F.3d at 541-42 (equitably tolling AEDPA because of district court's stay preventing petitioner's counsel from filing a timely habeas petition and because of petitioner's alleged mental incompetence). We have refused, however, to toll the AEDPA's limitations period based on an attorney's negligence. *See Frye v. Hickman*, 258 F.3d 1036, 1038 (9th Cir. 2001) (refusing to toll the AEDPA's statute of

limitations where petitioner's retained attorney negligently failed to file a habeas petition within the limitations period); *cf. Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (holding in Title VII context that attorney's ordinary negligence does not warrant equitable tolling).

Here, Rivera's attorneys' failure to file a petition within the AEDPA's limitations period did not amount to an extraordinary circumstance beyond Rivera's control. Rather, Rivera's attorneys' failure to file a petition constitutes ordinary attorney negligence. Furthermore, the negligence of Rivera's counsel did not render it impossible for Rivera to file his habeas petition on time. *See Frye*, 258 F.3d at 1038 (holding that attorney's negligence in failing to file petition within limitations period did not render it impossible for petitioner to file within statutory time frame because, in non-capital case, petitioner did not have right to appointed counsel and thus remained responsible for filing his habeas petition on time).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

JASON RIVERA,	)	
Petitioner,	)	**NO. ED CV 99-249-RT (JWJ)**
v.	)	
ANTHONY LA MARQUE, Warden, et al.,	)	**JUDGMENT**
Respondents.	)	(Filed July 31, 2000)

Pursuant to the Order Accepting and Adopting the Report and Recommendation of the United States Magistrate Judge, and Dismissing with Prejudice the Petition for Writ of Habeas Corpus ("Petition").

IT IS ADJUDGED that the Petition is dismissed with prejudice.

DATED: July 31, 2000.

/s/ Robert J. Timlin
ROBERT J. TIMLIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

JASON RIVERA, Petitioner, vs. ANTHONY LA MARQUE, et. al. Respondents.	No. EDCV 99-249 RT (JWJ) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** (Filed Jun. 30, 2000)

This Report and Recommendation is submitted to the Honorable Robert Timlin, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the instant Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

I. SUMMARY OF PROCEEDINGS

On July 15, 1999, Petitioner, a state prisoner proceeding with counsel, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254)" ("Petition"). On September 8, 1999, Respondents filed their Answer, arguing that the Petition should be dismissed as untimely. On September 30, 1999, Petitioner filed his "Response to the answer and Motion for Equitable Tolling." ("Response").

II. BACKGROUND

On June 28, 1995, a Riverside County jury found Petitioner guilty of second degree murder and attempted murder, in violation of California Penal Code section 187. The jury also found that the attempted murder was willful, deliberate and premeditated, and that Petitioner was vicariously armed, within the meaning of California Penal Code section 12022(a)(1), during the commission of the crimes. (3 Clerk's Transcript ("CT") 422-23). The trial court struck the vicariously armed allegations and sentenced Petitioner to consecutive terms of 15 years to life and life in prison. (3 CT 615-16).

Petitioner appealed to the California Court of Appeal, which affirmed the trial court on March 17, 1997. (Lodgment 2). Petitioner then sought review in the California Supreme Court, which denied review on June 18, 1997. (Lodgment 5).

On December 1, 1998, Petitioner filed a Petition for Writ of Habeas Corpus in the California Court of Appeals. The Court of Appeals denied the Petition without prejudice on December 11, 1998. (Lodgment 7). Petitioner then filed a Petition for Writ of Habeas Corpus in the Superior Court, which denied the Petition on January 20, 1999. (Lodgment 9). Petitioner then filed a Petition for Writ of Habeas Corpus in the California Court of Appeal, which denied the Petition on March 10, 1999. (Lodgment 11). Petitioner then sought review in the California Supreme Court, which denied review on May 12, 1999. (Lodgment 13).

III. DISCUSSION

For the reasons discussed below, the Petition is untimely and should be dismissed.

A. Applicability of the AEDPA

The instant Petition is governed by the provisions of the AEDPA because it was filed after April 24, 1996, the effective date of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed. 2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir.) (en banc), *cert. denied*, 479 U.S. 922 (1997).

B. The One-Year Statute of Limitations Under the AEDPA

Section 101 of the AEDPA amended 28 U.S.C. § 2244 by adding the following provision:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d), as amended by the AEDPA enacted April 24, 1996. Pub. L. No. 104-132, 110 Stat. 1214.

Under 28 U.S.C. § 2244(d)(1), Petitioner was required to file his Habeas Petition within one year of the dates contemplated by subdivisions (A) through (D) or within one year of the date of enactment of the Act (April 24, 1996), which ever was last. *See Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied* 118 S.Ct. 899 (1998), *overruled on other grounds Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc), *cert. denied* 119 S.Ct. 1377 (1999). However, under 28 U.S.C. § 2244(d)(2), the time during which a state Habeas Petition was pending should not be counted toward the limitations period.

C. Date Petitioner's Conviction Became "Final" and Date Habeas Petition was Due

Under section 2244(d)(1)(A), petitioner's conviction became final after the date of the enactment of the AEDPA. As discussed above, the AEDPA became effective on April 24, 1996. In this case, the California Supreme Court denied review on June 18, 1997. Petitioner then had 90 days to file a petition for certiorari in the United States Supreme Court, Sup. Ct. R. 13; 28 U.S.C. § 2101(d), which he apparently did not do. Thus, on September 16, 1997, his judgment became final "by . . . the expiration of the time for seeking . . . direct review." 28 U.S.C. § 2244(d)(1)(A). Therefore, under subsection one, Petitioner had one year from that date, through September 16, 1998, to file a federal Habeas Petition.[1]

However, as noted above, Petitioner did not file the instant Petition until July 15, 1999. Accordingly, unless some other tolling provision was triggered, the instant Petition is untimely.

D. Tolling

None of the tolling provisions applicable to the filing of federal Habeas Petitions under the AEDPA saves the Petition from untimeliness.

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[1] This date is three-months beyond the June 11, 1998 date incorrectly stated by attorney Ruiz in her June 12, 1998 letter. Discovery of this fact was not beyond plaintiff's control.

As noted above, the time during which a state Habeas Petition is pending should not be counted towards the AEDPA limitations period. However, in this case, Petitioner did not file his first state Habeas Petition until December 1, 1998. Because this was two and a half months after the expiration of the one-year AEDPA limitations period, it did not operate to toll the time during which Petitioner's federal Habeas Petition could be filed.

None of the statutory tolling provisions listed in 28 U.S.C. § 2244(d)(1)(A)-(D) applies in this case.

Petitioner argues that equitable tolling should apply because circumstances outside of his control prevented his filing the Petition on time. Specifically, he submits affidavits and other documents tending to show the following facts: (1) Petitioner retained a private attorney to file a federal Habeas Petition on his behalf; (2) both Petitioner and his father repeatedly contacted Petitioner's attorney during the year between June, 1997, and June, 1998, asking her to file a federal Habeas Petition; (3) Petitioner's attorney repeatedly promised that she would timely file a federal Habeas Petition; (4) starting at the beginning of 1998, Petitioner's attorney notified Petitioner and his father that she could not file a federal Habeas Petition until she had exhausted Petitioner's claims in state court; (5) in June, 1998, Petitioner's attorney notified Petitioner and his father that she was responsible for failing to exhaust Petitioner's claims in state court, that she was responsible for failing to notify Petitioner of this fact in a more timely manner, and that it would be better for another attorney to be retained; and (6) Petitioner retained a new attorney on July 13, 1998,

and the new attorney received the files, containing several volumes, from the old attorney on August 5, 1999. (*See* Exhibits to Response).

Significantly, Petitioner's former attorney has submitted an affidavit stating that:

> The one year delay from June of 1997 to June of 1998 was caused entirely by my inaction and failure to devote sufficient time to work on the petitioner's case. The petitioner did not contribute in any manner to the delay and in fact was at all times encouraging me through his father . . . to timely file the federal petition for writ of habeas corpus. I therefore urge that the court grant an equitable tolling to allow the petitioner's late filing of his petition for writ of habeas corpus.

(Declaration of Nedra Ruiz in support of Response, at 11, ¶ 7).

Petitioner relies primarily upon the *Beeler* case, 128 F.3d 1283, in order to substantiate his claim that equitable tolling should apply. He claims that the situation in this case in [sic] analogous to *Beeler* because, in both cases, the petitioner was relying on an attorney who eventually abandoned him without filing a federal Habeas Petition, leaving behind an unuseable work product. *See Beeler*, 128 F.3d at 1289.

"Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file the petition on time." *Beeler*, 128 F.3d at 1288-89. These extraordinary circumstances must include something external to petitioner over which he has no

control. *See, e.g., Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (equitable tolling applied where an incarcerated pro se litigant relied on prison authorities to draw on his trust account, prepare a check for filing, and mail that check and petition to the district court, but the authorities failed to do so); *Kelly*, 163 F.3d at 541 (equitable tolling applied where a petitioner's mental incompetency rendered him unable to assist his attorney in preparing the petition); *Beeler*, 128 F.3d at 1288-89 (equitable tolling applied where a petitioner's lead counsel withdrew, leaving an unusable work product for replacement counsel).

In *Beeler*, the Ninth Circuit upheld a District Court's decision to allow equitable tolling of a federal Habeas Petition where Beeler's lead counsel "had diligently pursued the preparation of Beeler's petition," but had withdrawn after accepting employment in another state, leaving a largely unuseable work product for replacement counsel. 128 F.3d at 1289. The court held that this was "a turn of events over which Beeler had no control." *Id.*

In the instant case, by contrast, it appears that Petitioner's first counsel, by her own admission, was *not* diligent in exhausting Petitioner's claims in state court or otherwise laying the groundwork for the filing of Petitioner's federal Habeas Petition. In addition, in contrast with *Beeler*, Petitioner's first counsel appears to have withdrawn from Petitioner's case not because of an external circumstance, but for the sole purpose of establishing the grounds for equitable tolling. In particular, counsel's June 12, 1998, letter to Petitioner's father states that she is withdrawing from Petitioner's case specifically in order to allow a new attorney to argue that the first counsel

was not diligent in preparing Petitioner's case. (*See* 6/12/98 letter from Nedra Ruiz to Jerome Rivera in support of Response).

This type of manufactured situation is not the type of external circumstance beyond Petitioner's control that would justify equitable tolling under *Beeler*. It is true that Petitioner, both personally and through his father, appears to have taken diligent steps to ensure that his federal Petition was timely filed. However, his attorney – acting as his agent – was clearly *not* diligent in working on Petitioner's case. Moreover, this lack of diligence was not brought about by a change of employment as in *Beeler*, or by any other circumstance besides counsel's own apparent negligence. A petitioner's ignorance of the filing deadlines, even if exacerbated by the actions of another party, does not constitute grounds for equitable tolling. *See Whalem/Hunt v. Early*, 204 F.3d 907, 909-10 (9th Cir. 2000); *see also Bolds v. Newland*, 1997 WL 732529, *2 (N.D. Cal, November 12, 1997) (ignorance of the law and lack of legal assistance not extraordinary circumstances sufficient to justify equitable tolling). This court does not read *Beeler* or any of the other equitable tolling cases as allowing an attorney who fails to act on a client's case for a year to then transform such apparent negligence into a virtue by intentionally abandoning the client.

There is another reason why Petitioner's argument for equitable tolling must fail. Petitioner's first counsel withdrew on June 12, 1998, giving Petitioner the phone number of the new attorney whom he eventually retained on July 13, 1998. That gave Petitioner's new attorney over

two months to obtain the necessary documents from Petitioner's first attorney, with whom he had already discussed Petitioner's case, and to file either a federal Habeas Petition or a state Habeas Petition that would have tolled the time for filing the federal Petition. This was not a great deal of time, given the apparent size of the record. Nevertheless, it appears that the new attorney could have filed a state or federal Habeas petition before the September 16, 1998, deadline. Accordingly, even absent Petitioner's first counsel's failure to timely file the necessary pleadings, equitable tolling should not be allowed.

The court is aware that none of the above circumstances are directly attributable to Petitioner. However, as noted above, there are two requirements for equitable tolling: (1) extraordinary circumstances beyond a prisoner's control; (2) that make it impossible to file the petition on time. *See Beeler,* 128 F.3d at 1288-89. Even assuming for the sake of argument that Petitioner has met the first requirement, he has not met the second requirement because his first attorney's apparent negligence did not make it "impossible to file the petition on time." Thus, despite the disservice done to Petitioner by that counsel, it would not be appropriate in this case to grant equitable tolling of the AEDPA limitations period.

IV. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2)

directing that Judgment be entered denying the petition on the merits with prejudice.

DATED: June 30, 2000

/s/ Jeffrey W. Johnson
JEFFREY W. JOHNSON
United States
Magistrate Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON RIVERA, Petitioner-Appellant, v. ANTHONY LA MARQUE, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 00-56636 D.C. No. CV-99-00249-RT ORDER (Filed Jan. 8, 2002)

Before: GOODWIN, WALLACE, and THOMAS, Circuit Judges.

The memorandum disposition filed on November 30, 2001, is amended as follows:

> Page 3, 1st full paragraph, line 4, delete the remainder of the paragraph, beginning with: "Furthermore, the negligence of Rivera's counsel did not render. . . . "
>
> Replace with: "Therefore we conclude that Rivera is not entitled to equitable tolling of the AEDPA's statute of limitations."

With the memorandum disposition thus amended, the panel has voted unanimously to deny the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judges Goodwin and Wallace recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.